Supreme Court, U.S.
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No. 02-430

IN THE

Supreme Court of the United States

LLEH, INC., doing business as BABE'S; APRIL COOPER; ANITA JACKSON, SARAH BLACKSTOCK,

Petitioners,

v.

WICHITA COUNTY, TEXAS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONERS' SUPPLEMENTAL BRIEF

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QUESTIONS PRESENTED

1. Under *Alameda Books* and *Encore Videos*, Wichita County has the burden to demonstrate that the 1,500 feet distance restriction is supported by some evidence that sexually oriented businesses in rural Wichita County cause secondary effects. Wichita County has failed to meet this burden.

2. The Wichita County Order regulating the operation and interior configuration of sexually oriented businesses does not meet the narrow tailoring standards agreed to by Justice Kennedy (concurring) and by Justice Souter (dissenting and joined by three other justices) in *Alameda Books*.

3. *Encore Videos* is dispositive of the issue of narrow tailoring.

STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement for petitioner, LLEH, Inc., was set forth at page *ii* of the Petition for a Writ of Certiorari, and there are no amendments to that statement.

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NEW FIFTH CIRCUIT CASE

Under Supreme Court Rule 15.8, Petitioner calls attention to the new Fifth Circuit case of *Encore Videos, Inc. v. City of San Antonio*, 2002 WL 31421656 (5th Cir., Texas) (October 29, 2002) (per Smith and Garza, C.J., and Cummings, D.J.) (unpublished).[1]

In *Encore Videos*, the Fifth Circuit interprets this Court's opinion[2] in *City of Los Angeles v. Alameda Books, Inc.*, __ U.S. __, 122 S. Ct. 1728, 152 L. Ed. 2d 670 (2002), with respect to the quantum of proof and the standards applicable to the issue of narrow tailoring. *Encore* effectively overrules *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988).

STATEMENT OF THE CASE

Petitioners filed their petition for writ of certiorari on September 13, 2002. Respondent filed its brief in opposition on October 24, 2002. This case is scheduled for conference on November 27, 2002. Petitioners have challenged the constitutionality of a December 1999 Order of the Wichita County, Texas Commissioners Court, regulating sexually oriented businesses in the rural unincorporated areas of Wichita County, Texas. The trial court granted relief, and the Fifth Circuit Court of Appeals reversed and remanded.

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1. The City of San Antonio Legal Department has indicated they will file a motion for rehearing.

2. The Court split 4-1-4 with J. Kennedy concurring.

1. **Under *Alameda Books* and *Encore Videos*, Wichita County has the burden to demonstrate that the 1,500 feet distance restriction is supported by some evidence that sexually oriented businesses in rural Wichita County cause secondary effects. Wichita County has failed to meet this burden.**

ARGUMENT

Encore Videos sold adult books and videos for off-premises viewing only. It was located within 1,000 feet of a residential area, but separated from the area by Loop 410. Encore challenged San Antonio Ordinance #82135 regulating sexually oriented businesses on the ground the 1,000 feet distance restriction was supported by no evidence that sales for off-premises viewing only caused secondary effects. San Antonio argued that it could reasonably rely upon studies from Seattle, Washington, Austin, Texas, and Garden Grove, California as sufficient evidence to invoke the secondary effects doctrine. The district court agreed and granted San Antonio summary judgment.[3] The circuit court reversed and remanded, holding foreign studies that did not differentiate between stores with on-premises viewing and those with off-premises viewing only or "take home" sales were not "reasonably relevant", and were inadequate to prove stores such as Encore Videos caused secondary effects. Without that proof, the San Antonio Ordinance did not meet that narrow tailoring standards in *Alameda Books*.

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3. Civ. A.S.A.-97-CA1139FB, 2000 WL 33348240 (W.D. Tex., Oct. 2, 2000).

In *Alameda Books*, Justice Souter agreed with the Ninth Circuit that the Los Angeles ordinance should be overturned because there was no evidence in the record to support the city's claim that separating two adult businesses in the same building actually reduced secondary effects. *Alameda* at p. 1748-49.

In *Encore Videos*, Justice Smith reversed the trial court holding instead that studies of businesses offering adult material for on-premises viewing were inadequate to prove that businesses offering like material for off-premises viewing only caused secondary effects.

In *LLEH*, the trial court found studies concluding that adult businesses in urban areas caused secondary effects inadequate and irrelevant to support the same finding for adult businesses in rural areas. *Alameda Books* and *Encore Videos* support the trial court's ruling.

Moreover, while *Alameda Books* and *Encore Videos* were "no evidence" cases, in *LLEH*, the studies relied upon by the County actually concluded that adult businesses located in rural areas caused no significant secondary effects. In addition, Petitioner's trial evidence that Babe's caused no secondary effects was uncontroverted by the County.

2. **The Wichita County Order regulating the operation and interior configuration of sexually oriented businesses does not meet the narrow tailoring standards agreed to by Justice Kennedy (concurring) and by Justice Souter (dissenting and joined by three other justices) in *Alameda Books*.**

ARGUMENT

Applying the *Marks* rule that when interpreting the opinion of a fragmented Court, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds", the Fifth Circuit found that the concurring justice (J. Kennedy), and the four dissenting justices reached common ground contrary to the plurality's opinion (J. O'Connor writing) that a government need not have empirical data nor demonstrate the efficacy of its proposal to combat secondary effects. *Marks v. United States*, 430 U.S. 188, 193 (1977); *see also Snead v. Redland Aggregates Ltd.*, 998 F.2d 1325, 1333, n.10 (5th Cir. 1993) (dissenting opinions can be used to make a 5-justice majority).

In *Encore*, the Fifth Circuit cited J. Souter, (dissenting) for the proposition that:

> . . . the burden on speech imposed by a secondary effects ordinance *must be proven* to be "no greater than necessary to further the city's interest" in combating second effects.

Alameda Books, 122 S. Ct. at 1749, n.8. [Emphasis added], and that,

> . . . Justice Kennedy goes even further: He would require the city to provide evidence showing that "the quantity of speech will be substantially undiminished, and that total secondary effects will be significantly reduced" by the challenged ordinance . . . *and that "the city must advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects, while leaving the quantity and accessibility of speech substantially intact."*

Id. at 1742 (J. Kennedy, concurring). *Encore* re-asserts the Fifth Circuit position that not only must the government prove that the ordinance serves a substantial interest, i.e., that the government show the *importance* of its interest, but also demonstrate that the ordinance is *effective* in serving that interest. Citing, *J&B Entertainment, Inc. v. City of Jackson*, 152 F.3d 362, 371 (5th Cir. 1998). The *Encore* panel concludes that the previously applied *SDJ* test for narrow tailoring: "[A]n ordinance is sufficiently well tailored if it effectively promotes the government's stated interest", *SDJ*, 837 F.2d at 1276, is insufficient under *Alameda Books*, not only under Justice Kennedy's and Justice Souter's more restrictive standards, but also because *Alameda Books* carves out no exceptions for sexually oriented businesses previously considered "subject to less than full First Amendment protection".

3. *Encore Videos* is dispositive of the issue of narrow tailoring.

ARGUMENT

In the instant case, *Encore Videos* should be dispositive. *Encore Videos*, just like *LLEH*, was decided before *Alameda Books*.[4] *LLEH* is analogous to *Encore Videos* in the following respects, and *certiorari* should be granted for the following reasons:

> (1) The county failed to demonstrate that a sexually oriented business, or specifically that Babe's, caused or might cause secondary effects in unincorporated rural Wichita County;
>
> (2) The studies relied upon by the County not only failed to demonstrate that rural sexually oriented businesses caused secondary effects, but the studies actually concluded they did not;
>
> (3) At trial Petitioner proved that Babe's, the only sexually oriented business in the unincorporated areas of Wichita County, caused no secondary effects, and this evidence was not controverted by the County;

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4. In this case, the motion for rehearing in *LLEH* was after *Alameda Books*. Despite that, the motion for rehearing was denied.

(4) Not only has the County failed to prove its Order serves an *important existing substantial governmental interest*, i.e., reducing the secondary effects of sexually oriented businesses in rural Wichita County, but also has failed to prove that its Order is *effective* in combating or reducing secondary effects;[5] and

(5) Both the distance and operating restrictions[6] under the Order are unconstitutional under *Encore Videos* because they fail the narrow tailoring tests in *Alameda Books* as set forth in the concurring opinion of J. Kennedy, and the dissenting opinion authored by J. Souter in that:

> (a) the County has failed to "advance some basis to show that its regulation has the purpose and effect of suppressing secondary effects,
>
> (b) while leaving the quantity and accessibility of speech substantially intact . . . and . . . undiminished."

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5. Although not in evidence before the court, Pearl Carter continues to sell off her land around Babe's at the same price she sold to Essary.

6. The 1,500 feet distance restriction from protected uses, and the six-feet buffer zone, eighteen-in elevation rule, demarcation rule, and unobstructed view provisions impacting the operation of the club.

CONCLUSION

For the foregoing reasons, the Court should take note of *Encore Videos, Inc. v. The City of San Antonio*, and grant the petition for a writ of certiorari.

Respectfully submitted,

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